**THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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|---|---|---|
| **ACCU-SPEC ELECTRONIC SERVICES, INC.** | : | |
| | : | |
| **Plaintiff,** | : | |
| | : | **C.A. NO.: 03-394 E** |
| **v.** | : | |
| | : | |
| **CENTRAL TRANSPORT INTERNATIONAL, INC. and LOGISTICS PLUS, INC.** | : | |
| | : | |
| **Defendants.** | : | |

**OPPOSITION TO PLAINTIFF'S MOTION FOR A JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL; MOTION FOR PRE-JUDGMENT INTEREST AND MOTION FOR RECONSIDERATION REGARDING CAUSE OF ACTION UNDER SECTION 14704 AND REQUEST FOR ASSESSMENT OF ATTORNEY'S FEES**

## BACKGROUND

Plaintiff presents four post-trial motions. One of the four post-trial motions addressing 49 U.S.C. § 14704, has also already been ruled upon by this Court, not once, but twice. Now, plaintiff moves for a third time to change the Court's ruling. Each of plaintiff's post-trial motions are addressed separately below.

# ARGUMENT

## PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Plaintiff's motion for judgment as a matter of law is untimely due to plaintiff's failure to raise this motion before submission of the case to the jury. Further, there is no legal support for judgment as a matter of law or for molding the verdict.

**Plaintiff's Motion For Judgment As A Matter Of Law Has Been Waived**

Federal Rule of Civil Procedure 50(a)(2) provides:

> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

Federal Rule of Civil Procedure 50(a)(2). The plain language of the Rule prohibits a motion for judgment as a matter of law in the form of a post-trial motion unless timely raised before submission of the case to the jury. This was not done in this case.[1] Furthermore, because the primary basis of plaintiff's protest with respect to the jury award is that the jury was confused by the Interrogatories to the Jury, this argument is also prohibited because counsel for Accu-Spec failed to raise any objections to the jury charge and Interrogatories to the Jury and quite clearly approved them. For this reason, any challenge now is waived. Courts have held that if counsel does not object to jury instructions and jury interrogatories during a charging conference, such objections are waived. Jacobs v. City of Philadelphia, 2005 U.S. Dist. LEXIS 16198 (E.D. Pa., August 8, 2005). Similarly, the United States Court of Appeals for the Third Circuit has held that failure to object to the jury instructions and the verdict sheet when they were presented

[1] Although counsel does not have the trial transcript, it is counsel's recollection that such a motion was not made by plaintiff.

waives such an objection. Intermedical Supplies, Ltd. v. EBI Medical Systems, Inc., 181 F.3d 446, 463 (3d Cir. 1999).

**There Is No Valid Basis To Mold The Jury's Verdict**

The Third Circuit has determined that the critical question in "molding" cases is whether the jury's answers in the verdict are necessarily inconsistent with each other. Loughman v. Consol-Penn Coal Co., 6 F3d. 88, 104 (3d Cir. 1993). If there is any explanation for a jury verdict, molding will not be instituted as a means to look behind the jury's determination. The jury instructions, approved by counsel for plaintiff, provide in pertinent part:

> If you find that Central Transport is liable, you must also find that Logistics is liable, and you must find them liable in the same amount, although there will only be one recovery.

Not only was this sentence included by the Court and approved by plaintiff's counsel, it was specifically discussed at the charging conference. If plaintiff's counsel had any issue with this instruction, that was the time to raise it. Similarly, the jury questionnaire provides at Interrogatories 6 and 7:

> 6. What amount, if any, is plaintiff entitled to recover from Central Transport? $____________
>
> 7. What amount, if any, is plaintiff entitled to recover from Logistics Plus? $____________

Again, these interrogatories were fully and completely discussed at the charging conference. If plaintiff's counsel had any opposition or requested modification to these instructions, these issues should have been raised at that time.

Regardless of plaintiff's failure to make timely objections or suggested modifications with respect to the jury instructions and the jury interrogatories, the outcome is consistent with a jury's reasonable evaluation of the evidence presented. The Supreme Court has applied the

Seventh Amendment to the United States Constitution addressing the issues of modifying a jury's determination. The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed $20.00, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

With respect to modifying damage amounts set by juries, the Supreme Court has ruled that in cases where the amount of damages is uncertain, their assessment is a matter "so peculiarly within the province of the jury that the Court should not alter it." Dimick v. Schiedt, 239 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935). The Supreme Court recognized that maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.

Here, the plaintiff had the burden to establish the dollar amount of damages it should recover. There was no stipulation as to the damages amount. Plaintiff introduced certain invoices to the jury addressing certain charges. Plaintiff did not individually analyze these charges before the jury, tally them before the jury or focus any significant attention whatsoever to these charges before the jury. It is well within the jury's province to analyze the information presented by the plaintiff and assess the reasonableness of these charges and the amount of damages. There is no requirement that a defendant introduce specific evidence challenging damages amounts for the requested amount of damages to be reduced. It is up to the plaintiff to meet its burden to convince the jury of their reasonableness and merit.

In any event, plaintiff's theory that the jury impermissibly calculated damages was not confirmed by the amount awarded. Even if the jury intended to award the total dollar amount set forth on both damages lines on the jury questionnaire, this comes to $42,000.00. Plaintiff's demand presented to the jury was for $47,521.84. Even subtracting the inspection costs of Mr. Dunn (which the jury found unreasonable), the total comes to $45,371.02, not $42,000.00. Here, the jury did not simply make a mathematical error. The jury fully understood the claims and its responsibility with respect to damages.

The only two cases cited by plaintiff to support their request for molding the verdict are easily distinguishable. In the EEOC case, the jury mistakenly applied the wrong date of firing of an employee seeking compensation. The court determined that this mistake was to be remedied. EEOC v. Massey Yardley Chrysler Plymouth, Inc., 117 F.3d 1244, 1252-53 (11th Cir. 1997). Here, there is no such technical error which can be attributed to the jury. Here, there is no stipulation as to the amount of damages and it is well within the jury's ability to analyze the invoices presented to come to a determination as to the proper amount of damages to be afforded. Similarly, the Liriano case which addressed a specific dollar amount included in one invoice was inadvertently not included in the jury verdict. Liriano v. Hobart Corp., 170 F.3d 264, 272-73 (2d Cir. 1999). Here, no such facts are present.

**PLAINTIFF'S MOTION FOR A NEW TRIAL**

This Court set forth the standard to be applied to a motion for a new trial two years ago in Moussa v. Commonwealth of Pennsylvania Department of Public Welfare, 289 F.Supp.2d 639, 648 (W.D. Pa. 2003) (opinion by the Honorable Sean J. McLaughlin). The standard of review set forth in the Moussa matter is as follows:

> A Rule 50 motion for judgment as a matter of law should be granted only if, "viewing the evidence in the light most favorable to the non-movant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability." Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 568 (3d Cir. 2002) (citation

> omitted). Such a motion must be denied "if there is evidence reasonably tending to support the recovery by [the] plaintiff as to any of [his] theories of liability." Hofkin v. Provident Life & Accident Ins. Co., 81 F.3d 365, 369 (3d Cir. 1996).
>
> Rule 59(a) of the Federal Rules of Civil Procedure allows a party to seek relief from a judgment by filing a motion for a new trial. This relief may be sought on the grounds, e.g., that the verdict is against the weight of the evidence, that the damages are excessive, or that the district court made substantial errors in the admission or rejection of evidence or in its instructions to the jury. See Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 85 L. Ed. 147, 61 S. Ct. 189 (1940). Generally, the decision whether or not to grant a new trial "is committed to the sound discretion of the district court." Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 812 (3d Cir. 1984). The court's latitude varies, however, depending on the type of error alleged. Klein v. Hollings, 992 F.2d 1285, 1289-90 (3d Cir. 1993). Its latitude "is broad when the reason for interfering with the jury verdict is a ruling on a matter that initially rested within the discretion of the court," such as evidentiary rulings. Id. The court's discretion is more limited when granting a new trial on the basis that the jury's verdict is against the weight of the evidence; in such cases a new trial should be awarded "only when the record shows that the jury's verdict resulted in a miscarriage of justice or when the verdict, on the record, cries out to be overturned or shocks our conscience." Williamson v. CONRAIL, 926 F.2d 1344, 1353 (3d Cir. 1991). See also Delli Santi v. CNA Ins. Cos., 88 F.3d 192, 201 (3d Cir. 1996); Roebuck v. Drexel Univ., 852 F.2d 715, 735-36 (3d Cir. 1988). A new trial may not be granted merely "because the evidence was sharply in conflict, because the jury could have drawn different inferences or conclusions, or because another result is more reasonable." Shushereba v. R.B. Indus., Inc., 104 F.R.D. 524, 527 (W.D. Pa. 1985). Moreover, a verdict may not be set aside when it is plausible or when it has a rational basis. See Delli Santi, 88 F.3d at 202. According to the Third Circuit, "this limit upon the district court's power to grant a new trial seeks to ensure that a district court does not substitute its 'judgment of the facts and the credibility of witnesses for that of the jury,'" so as to effect a denigration of the jury system. Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 211 (3d Cir. 1992) (citation omitted).

Moussa v. Pa. Dept. of Public Welfare, 289 F.Supp.2d 639 (W.D. Pa. 2003). Plaintiff's request for a new trial in the instant case falls into the category of more limited discretion for the court in granting a new trial. Plaintiff seeks to modify the verdict as it believes it is against the weight of the evidence. In such circumstances, the movant must establish that there was (1) a miscarriage of justice or (2) the verdict shocks the conscience of the court. A new trial cannot be granted because another result may be "more reasonable" to one of the parties. Further, the verdict in this case also has a rational basis. Here, the jury could have evaluated each of the invoices involved and come to their own conclusion as to the reasonableness of these charges. Certainly, the jury's determination does not shock the conscience or result in a miscarriage of justice. Plaintiff's motion for a new trial should be denied.

## PLAINTIFF'S MOTION FOR PRE-JUDGMENT INTEREST

Central Transport does not deny that pre-judgment interest is allowable within the discretion of the trial judge as part of the compensation granted in Carmack Amendment cases. Central Transport also does not dispute the interest rate selected by Accu-Spec in its motion of 4.14%. Central Transport does not agree with any of the reasoning applied by Accu-Spec in arriving at the determination that pre-judgment interest is permissible, including the content or depth of any investigation conducted by Central Transport. There is also a question as to whether the interest begins accruing 120 days after plaintiff's original cargo loss and damage claim or its amended cargo loss and damage claim. Logic would suggest that interest would commence after the amended claim filed on April 28, 2003. The difference is $57.17. For this reason, the amount of the pre-judgment interest to be awarded, if the Court deems such an award appropriate, is $1,869.80. For reasons which are clear from the arguments set forth in prior sections of this memorandum, the interest calculation should be based only the $21,000.00 awarded, not the desired damages amount Accu-Spec seeks of $45,371.02.

Given the difficulty in determining any amount due plaintiff, defendant opposes the award of any pre-judgment interest to plaintiff.

**PLAINTIFF'S MOTION FOR RECONSIDERATION FOR THE SECOND TIME OF THE GRANT OF CENTRAL TRANSPORT'S SUMMARY JUDGMENT ADDRESSING ACCU-SPEC'S CLAIM 49 U.S.C. § 14704**

**Standard For A Motion For Reconsideration**

A motion for reconsideration is appropriate for the purpose of correcting manifest errors of law or fact or to present newly discovered evidence. Corneal v. Jackson Twp., 313 F.Supp. 2d 457, 472 (M.D.Pa. 2003), aff'd, 94 Fed Appx. 76, 2004 U.S. App. LEXIS 7198 (3d Cir. 2004), cert. denied, 160 L. Ed. 2d, 125 S.Ct. 91 (U.S. 2004), citing Harsco Corp. v. Zlotnicki, 779 F.2d 906 (3d Cir. 1985). The Court may alter or amend its prior decision if the party seeking reconsideration can show one of the following: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the Court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact to prevent manifest injustice. Id., citing Max's Seafood Café by Lou-Ann, Inc. v. Quniteros, 176 F.3d 669, 677 (3d Cir. 1995). Additionally, a motion for reconsideration is not a proper vehicle to merely attempt to convince a court to rethink a decision it has already made. Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D. Pa. 1993). Plaintiff has not fulfilled any of the bases to merit a motion for reconsideration of either its motion to mold the verdict (crafted as an untimely, Motion for Judgment as a Matter of Law) or for its third attempt at a claim pursuant to 49 U.S.C. § 14704.

This is not the first or even the second time that Accu-Spec has attempted to persuade this Court to make a determination on the very same issue, arguing the very same cases, reciting the very same facts. Plaintiff's first brief on this issue was filed on December 13, 2004, entitled

"Accu-Spec Electronic Services, Inc.'s Supplemental Brief in Opposition to Central Transport International, Inc.'s Motion for Summary Judgment." The Court then heard oral argument on this motion. On August 17, 2005, the Court issued an Order granting Central Transport's Motion for Summary Judgment as to plaintiff's count addressing 49 U.S.C. § 14704. On August 29, 2005, Accu-Spec filed a Motion for Reconsideration of the Court's ruling granting Central Transport's Motion for Summary Judgment addressing plaintiff's claim pursuant to 49 U.S.C. § 14704 including 43 pages of exhibits. The Court then heard oral argument on September 20, 2005 addressing the very same issues raised so many times in prior briefing on this issue. During oral argument, the Court recognized that the substance and subject matter of the instant case was for damage to goods in transit pursuant to 49 U.S.C. § 14706 and as such did not implicate 49 U.S.C. § 14704.

Plaintiff has not cited any intervening change in controlling law, the availability of any new evidence not available when the Court granted the Motion for Summary Judgment, or the need to correct a clear error of law or fact to prevent manifest injustice. This motion, addressing the same issues for the third time, is also a violation of 28 U.S.C. § 1927 as it improperly and inadvertently has multiplied these proceedings and caused unwarranted and unnecessary attorney's fees to be expended by Central Transport to again defend against the same arguments raised so many times before. For this reason, Central Transport seeks attorney's fees and costs expended to defend against this argument for the third time.

Plaintiff's first brief, second brief, and now its third brief addressing this topic once again relies upon the Crosby v. Landstar case found at 2005 U.S. Dist. LEXIS 12008 (D. Del. June 21, 2005). As previously briefed, if anything, this case provides authority which is contrary to plaintiff's position. In the Crosby case, the court concluded that the plaintiff, which was asserting a negligence claim, failed to allege a claim that could be remedied under 49 U.S.C. § 14704, and dismissed plaintiff's claims. See Crosby, at 7. In much the same way, plaintiff in the instant matter has failed to allege a claim that could be remedied under § 14704. The claims alleged by plaintiff are associated with the freight claims contemplated and covered under the Carmack Amendment, 49 U.S.C. § 14706. Like the negligence claims disallowed in Crosby, claims for damage to freight are not valid claims that can be remedied under 49 U.S.C. § 14704. Furthermore, the Crosby case makes clear that the section of the ICC Termination Act which allows commercial disputes to be brought in federal court, is limited to disputes which had been administratively adjudicated by the ICC. A claim for freight loss and damage is not such a dispute. The Carmack Amendment predates the ICC Termination Act and has always been the forum to address freight damage claims. Crosby, at 5.

The second case repeatedly cited by plaintiff in all of its multiple briefs is the Owner-Operator Independent Drivers Association, Inc. ,et al. v. New Prime, Inc., et al. found at 192 F.3d 778 (8th Cir. 1999). As repeatedly argued, this case is not persuasive because it also did not address § 14706 Carmack freight damage claims and it is instead limited to motor carrier leasing issues. This case, too, was already presented to the Court by plaintiff during the hearing on Central Transport's Motion for Summary Judgment, again in plaintiff's supplemental brief in opposition to Central Transport's Motion for Summary Judgment, plaintiff's Motion for Reconsideration of the Court's ruling on Central Transport's Motion for Summary Judgment, oral argument addressing this motion and now, for the fourth time in this motion for re-reconsideration. The Court has obviously already considered the rulings in Crosby and New Prime and correctly concluded that the decisions have no applicability to the claims at issue. Raising them again in this improperly filed motion is improper and insulting.

Under any reading of 49 U.S.C. § 14704 it simply has no application to the freight claim pled. When there is a question of statutory interpretation, a court begins with the language of the statute itself. In re United Healthcare System, Inc., 200 F.3d 170, 176 (3d Cir. 1999). The first determination is whether the language has a plain and unambiguous meaning with regard to the particular dispute. Michael C. v. Radnor Township School District, 202 F.3d 642, 648 (3d Cir. 2000). Plaintiff suggests that it is entitled to assert a cause of action pursuant to § 14704 despite the plain reading of the language of the statute which in no way relates to the substance of any of the claims in this case.

Accepting plaintiff's argument would require the Court to ignore the fact that Title 49 provides for a specific well defined and universally accepted regimen for freight claims under 49 U.S.C. § 14706. Congress has specifically provided for this section to address the claims which are the subject of this litigation and based on the plain language never intended for these types of claims to be addressed in § 14704. Interpretation of a statute must give effect, if possible, to every word and cause of a statute. Alexander v. Riga, 208 F.3d 419, 430 (3d Cir. 2000). Statutory interpretations which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. First Merchants Acceptance Corp. v. J.C. Bradford & Co., 198 F.3d 394, 402 (3d Cir. 1999). Not only would an analysis consistent with Plaintiff's ignore the plain reading of the statute selected for its cause of action, it would also nullify the section of the statute which actually provides for a cause of action against Logistics Plus as the freight forwarder.

Finally, Plaintiff's claim pursuant to Section 14704 also has no evidentiary support. Plaintiff admits that Central did in fact respond to plaintiff's claim in a timely manner. The claim was subsequently "amended" to reflect more accurate dollar values arising out of the same incident. This in no way was a new claim as it arose out of the same incident and had previously been rejected. These facts are undisputed, and Plaintiff has not introduced any new evidence. Plaintiff's claim based on 49 U.S.C. § 14704 continues to be frivolous, legally unsupportable and lacks any evidentiary support.

Furthermore, the cause of action pursuant to § 14704 was removed from consideration before evidence was presented at trial. Central Transport therefore had no basis to develop a factual record with respect to fulfilling the C.F.R. provisions referenced by Accu-Spec.

**Hoover v. Allied Van Lines, Inc.**

Accu-Spec suggests that the "only" authority relied upon by the Court in making its determination not to grant plaintiff's first Motion for Reconsideration is Hoover v. Allied Van Lines, Inc., 111 P.3d 1076, 2005 WL 1277952 (Kan. App. 2005). This assumption is unfounded considering Accu-Spec itself has cited other cases, as has Central Transport, in the never ending process of briefing this same issue. There is no reason to believe the Court did not consider these cases as well as the statutes cited within these cases as well. The Hoover case is but one additional authority establishing that § 14704 is inapplicable to a § 14706 claim for freight loss and damage.

## CONCLUSION

For all of the foregoing reasons, plaintiff respectfully this Court to (1) deny plaintiff's motion for a judgment of the matter as a matter of law, (2) deny plaintiff's motion for a new trial, (3) not award pre-judgment interest or limit the amount of pre-judgment interest, (4) deny plaintiff's second Motion for Reconsideration addressing 49 U.S.C. § 14704 and (5) award attorney's fees and costs to defendant pursuant to 49 U.S.C. § 1927 for plaintiff's improper conduct in forcing defendant to again address issues which have been ruled upon twice before.

Respectfully submitted,

**JANSSEN & KEENAN P.C.**

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Dated: November 14, 2005

## CERTIFICATE OF SERVICE

This is to certify that on this, the 14th of November 2005, a copy of the foregoing Opposition to Plaintiff's Motion for a Judgment as a Matter of Law or, in the Alternative, Motion for a New Trial; Motion for Pre-Judgment Interest and Motion for Reconsideration Regarding Cause of Action Under Section 14704 and Request for Assessment of Attorney's Fees was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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I hereby certify that on this, the 14th day of November 2005, a copy of the foregoing Opposition to Plaintiff's Motion for a Judgment as a Matter of Law or, in the Alternative, Motion for a New Trial; Motion for Pre-Judgment Interest and Motion for Reconsideration Regarding Cause of Action Under Section 14704 and Request for Assessment of Attorney's Fees was served via facsimile, upon the following:

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